

# McCaskill Proposal

## I. Proposed legislation: ARM13982 “Better Enforcement for Sexual Assault Free Environments Act of 2013”

- A. **Purpose:** To amend title 10, United States Code, to make certain improvements in the Uniform Code of Military Justice related to sex-related offenses committed by members of the Armed Forces, and for other purposes.
- B. **Effect:** The 25 page bill does not include any changes to a convening authority's referral power or authority to convene courts-martial.

## II. Senator McCaskill's Congressional Comments and RSP Public Meeting Testimony

### A. Senator McCaskill's comments on overarching goals of her proposal

1. But I think it is time to take a hard look at whether or not the rules of the road can be adjusted to still give the unique aspect to military justice that it deserves. I am not saying it should be like the civil criminal system, but there do seem to be some things that make absolutely no sense. *Transcript of Hearing, SASC Subcommittee on Personnel at 72 (Mar. 13, 2013).*
2. The Senate Armed Services Committee marked up sexual assault provisions in the fiscal year 2014 defense authorization. Members focused on proposals that would remove some decision-making about cases from the chain of command or provide for independent review authority in the management of sexual assault cases. During the session, Senator McCaskill provided same or similar comments on her stance that the commander should be kept in the process at the beginning of a criminal proceeding and must hold commanders accountable. Comments were similar to those provided in her subsequent RSP testimony on September 24, 2013. *SASC Military Sexual Assault Legislation Markup Session (June 12, 2013)* (video available at <http://www.c-spanvideo.org/program/AssaultLe>).
3. I think that Senator Gillibrand and I have the exact same goal, to hold commanders accountable, to protect victims in a safe space, and to encourage reporting so that justice can be served. *Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 344 (Sept. 24, 2013).*
4. Question from Congresswoman Holtzman: Granted that that's the case, that we don't know whether, you know, changing the commander will make a difference, or changing Article 60, or, you know, having lawyers for every victim, and all the things suggesting that commanders be held accountable for the climate and so forth. But if - - part of, I think, what you're trying to do in the Senate is to send a signal to everybody in the military -- our troops, the families, the American people -- that we're really trying to change a system that has not served our troops our public and sense of justice. If you make a change of this magnitude, wouldn't that help or what's your answer to the view that making a change of this magnitude might help to strengthen that signal, that business as usual is not going to happen anymore? I mean, it may be that we're just jumping from the frying pan into the fire. I'm not going to disagree.

But that's my question to you. Does this help send a transformative signal to our troops, to the American public that business as usual isn't going to go on? And is that enough, or should we be sending signals? Should we be doing more than sending signals? *Transcript of Testimony, RSP Public Meeting at 362-64 (Sept. 24, 2013).*

- a. Senator McCaskill's response: I don't know that changing the law for purposes of sending signals is important as changing law to make a real substantive difference in the essence of the problem without doing harm with unintended consequences. I believe the changes we're making are going to make a substantive difference in terms of how these cases are handled. I believe -- honest disagreement -- that the change being advocated by Senator Gillibrand could have harmful, unintended consequences with fewer prosecutions and more retaliation for the victim, and no greater reporting. *Transcript of Testimony, RSP Public Meeting at 364-65 (Sept. 24, 2013).*

**B. Senator McCaskill's comments on commanders' role and holding commanders accountable**

1. We have an honest disagreement about the best way to achieve that result, and that revolves around the simple question, do you remove commanders from any decision point in any criminal case that would be punished similar to a felony? And I believe that is a mistake in terms of commander accountability. *Transcript of Testimony RSP Public Meeting at 344-45 (Sept. 24, 2013).*
2. I understand the point you made, but I think that there will have to be a stronger argument than that for me not to come down on the side that clemency belongs at the end of a legal determination, not in the middle of it. I am not somebody who believes that somebody who has not heard the evidence presented should be making a determination on who was telling the truth. *Transcript of Hearing, SASC Subcommittee on Personnel at 64 (Mar. 13, 2013) (as part of questions and discussion on convening authority's Art 60 power, particularly in response to comments by General Chipman).*
3. I believe that we are not likely to hold our commanders accountable for the environment, for example, that the Panel member asked about what happens in the early days after an assault, way before an investigation has been completed and prosecutors have made recommendations or JAGs have made recommendations. What is that climate like? *Transcript of Testimony, RSP Public Meeting at 345 (Sept. 24, 2013).*
4. But I believe that we have an obligation to hold these commanders' feet to the fire, hold them accountable for the culture. And I believe if we let them off the hook from any decision making in this, we are not going to move towards that goal as quickly as we would otherwise. *Transcript of Testimony, RSP Public Meeting at 352 (Sept. 24, 2013).*
5. Question from Ms. Fernandez: I have a question about the example that you gave when you started your testimony. You said that if you had a victim that was with a commander and the decision was being made half a continent away, that that commander wouldn't have anything left at his or her disposition to really help that

victim. Earlier today we talked a lot about the commanders still retain discipline over their troops. Isn't it true, though, that they could move the victim, move the perpetrator, that there could be administrative sanctions that could be taken by that commander short of prosecution in the interim so that that victim did not feel disempowered, their safety would be in peril, all of that. That there's one thing about -- prosecution is almost -- it's an extreme in some ways, and there's a whole bunch of other things that could also -- that are still within the power of the commander, and that's not being removed. *Transcript of Testimony, RSP Public Meeting at 356 (Sept. 24, 2013).*

- a. Senator McCaskill's response: And I don't mean to imply that by removing the commander you remove any tools he has to protect that victim. But ultimately, it is not as much his problem anymore or her problem anymore, because this is a decision in terms of what's really going to happen to the perpetrator and what justice is going to happen. This is a decision that's far removed from his unit now. *Transcript of Testimony, RSP Public Meeting at 357 (Sept. 24, 2013).*
6. Question from Ms. Fernandez: Well, isn't it actually the opposite? I mean, you've got a question about prosecution, and that lies here and that's a legal decision. But as you yourself stated, that person is still living with the perpetrator or living with the victim, and the commander is going to have figure out that situation. So in some ways, all you're removing is the prosecution, but the rest of it lies there with the commander. *Transcript of Testimony, RSP Public Meeting at 357 (Sept. 24, 2013).*
  - a. Senator McCaskill's response: I agree with what you're saying, and further we've made retaliation a crime, which also helps. We've done that in the underlying bill. But I would say that if the commander knows that they have no stake in whether or not the case goes forward, that it's not their call anymore, I think it changes the way they view the problem. I think over time it could. You know, yes, they could move the perpetrator. Yes, they could move the victim. Yes, they would be responsible that it was reported if there were crimes of retaliation. But I do think it's different if you completely remove. And it's not just for this crime, it's for all felonies. *Transcript of Testimony, RSP Public Meeting at 357-58 (Sept. 24, 2013).*
7. Question from Mr. Bryant: But do you think it would give those who are questioning the efficacy of the changes more confidence if we had pilot programs or no? *Transcript of Testimony, RSP Public Meeting at 373 (Sept. 24, 2013).*
  - a. Senator McCaskill's response: I'm not going to ever say never about a pilot program for looking at having a prosecutor in charge of all the decision making in the case. I think we'd have to work on how we did it. It couldn't just be the prosecutor. You'd have to have it be a little more balanced in terms of the way it was proposed. *Transcript of Testimony, RSP Public Meeting at 374 (Sept. 24, 2013).*

### **C. Senator McCaskill's comments on protecting the victim**

1. But I think if you're a victim and you're returning to your workplace, that commander having no say as to what happens to that case does not encourage an environment

of protection. If you return to your unit and word gets out that this happened and you've reported it, and some lawyer a half a continent away, some JAG officer a half a continent away is mulling over the case and whether or not it's going to go forward. In which environment will be the victim be more protected, when the commander is still accountable for what happens going forward or the commander no longer has any role? *Transcript of Testimony, RSP Public Meeting at 345-46 (Sept. 24, 2013).*

2. I believe the victim will be better protected when the commander is still accountable for the decisions that are going to be made, not after a jury has made its decision. Those of you who watched the hearing in June or have watched me on the Armed Services Committee, somebody said that I was coddling the military. Well, they haven't been paying attention because I guarantee you that nobody in the military thinks I've been coddling them. But I do believe the environment would be more protective for a victim keeping commanders' accountability for the initial decision. *Transcript of Testimony, 24 Sep 13 RSP Public Meeting at 346 (Sept. 24, 2013).*
3. But the narrative that's being painted that this is victims versus commanders does the subject matter a disservice, because many victims don't agree that removing the commander is somehow going to be the insulation they need to provide the protection. *Transcript of Testimony, RSP Public Meeting at 349 (Sept. 24, 2013).*

#### **D. Senator McCaskill's comments as to number of prosecutions**

1. And I believe, based on my years of experience, that the only way that victims of sexual assault are going to feel empowered in the military is when they finally believe that the focus on the military is to get these guys and put them in prison. So I believe that the focus of our efforts should be on effective prosecution and what do we need to do to make sure that these investigations are done promptly and professionally, that the victims are wrapped in good information, solid support, and legal advice, that the prosecutors have the wherewithal and the resources to go forward in a timely and aggressive way, and you do not have the ability of some general somewhere who has never heard the testimony of factual witnesses in a consent case who can wipe it out with the stroke of a pen. *Transcript of Hearing, SASC Subcommittee on Personnel at 28-29 (Mar. 13, 2013).*
2. We've got to get victims protection. We've got remove the commander from being able to fool around after a jury has made its decision. And we've got to realize that a JAG is a JAG is a JAG, and, yes, JAGs are not judged on their conviction rate, but neither were my prosecutors. . . But if you think you can remove from a prosecutor the consideration as to whether or not they're going to win or not, you've not been in the courtroom with one of these cases, because that's impossible to completely remove from a prosecutor's mind. *Transcript of Testimony, RSP Public Meeting at 350-51 (Sept. 24, 2013).*
3. And we do know this: over the last two years, there have been almost 100 cases where prosecutors have turned down the cases and commanders have gone forward. So there's almost 100 women who would not have had their day in court if a prosecutor was the last place that the decision was going to be made. And under the reform that Senator Gillibrand is, in fact, embracing, that's the first and last place that anything occurs. *Transcript of Testimony, RSP Public Meeting at 351 (Sep. 24, 2013).*

4. Question from VADM Houck: The one -- after those comments, one question that I want to ask, and I think I know the answer, but I would ask anyway. Are you aware of any empirical data that shows that reporting will go up if commanders are taken out of the system? *Transcript of Testimony, RSP Public Meeting at 354 (Sept. 24, 2013).*
  - a. Senator McCaskill's response: No. And furthermore, I'm not aware of any data where JAGs have said to go forward on cases and commanders have refused, you know. And that's the essence of this argument. *Transcript of Testimony, RSP Public Meeting at 354 (Sept. 24, 2013).*
  - b. ...but we don't have a body of data that would indicate that commanders are refusing the recommendations of their JAGs because they're trying to protect someone that is in their command. *Transcript of Testimony, RSP Public Meeting at 355 (Sept. 24, 2013).*

#### **E. Senator McCaskill's comments on reporting**

1. I want to start with the fact that I think part of the problem here is you all have mushed together two issues in ways that are not helpful to successful prosecution. There are two problems. One is you have sexual predators who are committing crimes. Two, you have work to do on the issue of a respectful and healthy work environment. *Transcript of Hearing, SASC Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military at 28-29 (June 4, 2013).*
2. I want to start with I think the way you all are reporting has this backwards because you are mushing them together in the reporting. *Transcript of Hearing, SASC Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military at 29 (June 4, 2013).*
3. Unwanted sexual contact is everything from somebody looking at you sideways when they shouldn't to someone pushing you up against the wall and brutally raping you. *Transcript of Hearing, SASC Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military at 29 (June 4, 2013).*
4. You have got to, in your surveys, delineate the two problems because until you do, we will have no idea whether or not you are getting your hands around this. We need to know how many women and men are being raped and sexually assaulted on an annual basis, and we have no idea right now because all we know is we have had unwanted sexual contact, 36,000. Well, that doesn't tell us whether it is an unhealthy work environment or whether or not you have got criminals. And you have got to change that reporting. *Transcript of Hearing, SASC Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military at 29 (June 4, 2013).*
5. Now reporting is the key. And Senator Gillibrand and I are in complete agreement that this is about creating a culture where victims are comfortable coming forward, and that is incredibly important. *Transcript of Hearing, SASC Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military at 29 (June 4, 2013).*

6. Encouraging reporting. With all due respect to my colleague, I heard her in the Armed Services Committee say that, in fact, that our Allies did have an increase in reporting, and that was a reason to make this change because there would be an increase in reporting. In fact, it was even cited that Israel had had an 80 percent increase in reporting. Well, as it turns out, that's not completely accurate because if you go back over a four-year period, there wasn't a meaningful increase in reporting. In fact, none of our Allies have seen an increase in reporting. And if our goal -- if this is going to be the magic that is going to all of a sudden make victims feel comfortable coming forward that the commanders are removed, wouldn't we have seen an increase in reporting in all of those jurisdictions? During the period of time those changes have been made in Allies' UCMJs and their military justice systems, their reporting has not gone up at all. Meanwhile in the United States, it's gone up almost 100 percent in the same period of time. And that's before we have enacted the historic and major reforms that are in this bill. *Transcript of Testimony, RSP Public Meeting at 347-48 (Sept. 24, 2013).*
7. I will just tell you that in my experience victims don't come forward for a lot of different reasons. And anybody who thinks anything that we do is going to be like turning a light switch on victims coming forward, I mean, this is the most traumatically painful and personal moment these men or women will ever have in their lives. And coming forward and going through what you have to go through to air it all in public is an incredibly difficult thing. *Transcript of Testimony, RSP Public Meeting at 360-61 (Sept. 24, 2013).*

### **III. Press Releases and Statements to Media**

#### **A. Zoe Carpenter, *Temperatures Rising Over Military Sexual Assaults*, The Nation, July 19, 2013**

1. "If outside prosecutors are making the decisions, the chance of retaliation goes up, not down," McCaskill told *The Nation* after the hearing. "If everybody in the unit knows the commander has said 'this needs to go to court,' that gives you a level of protection you will never have when everyone knows a bunch of outside lawyers have bought your bull." Zoe Carpenter, *Temperatures Rising Over Military Sexual Assaults*, The Nation (July 19, 2013) available at <http://www.thenation.com/blog/175357/temperatures-rising-over-military-sexual-assaults#>.
2. McCaskill, a former prosecutor, expressed a lot of faith that the system will fix itself. "We have made massive changes in a relatively short period of time, and without giving them a chance to work. There's a little bit of a political rush to judgment now," she said. "There is this notion that this one other piece is the magic elixir that will all of a sudden make the military be perfect when it comes to sexual assault, and it's naïve and I think frankly comes from not having as much experience as some of us have in this particular arena." Zoe Carpenter, *Temperatures Rising Over Military Sexual Assaults*, The Nation (July 19, 2013) available at <http://www.thenation.com/blog/175357/temperatures-rising-over-military-sexual-assaults#>.

#### **B. Joint News Conference with Senator Ayotte and Senator Tester, July 25, 2013**

1. Both of us agree that the best way to protect victims and realize more aggressive and successful prosecutions is by keeping the chain of command in the process at the beginning of a criminal proceeding within the UCMJ. *Joint News Conference with Senator Ayotte and Senator Tester (July 25, 2013)* (video available at [http://www.weeklystandard.com/blogs/ayotte-mccaskill-female-vets-push-back-against-gillibrand-amendment\\_741056.html](http://www.weeklystandard.com/blogs/ayotte-mccaskill-female-vets-push-back-against-gillibrand-amendment_741056.html)).
2. We believe that there will be less retaliation. We believe there will be more prosecutions, and the numbers support that. We believe that the only way to hold command accountable is to make them responsible, not to completely remove their responsibility. We believe that's a recipe for disaster. *Joint News Conference with Senator Ayotte and Senator Tester (July 25, 2013)* (video available at [http://www.weeklystandard.com/blogs/ayotte-mccaskill-female-vets-push-back-against-gillibrand-amendment\\_741056.html](http://www.weeklystandard.com/blogs/ayotte-mccaskill-female-vets-push-back-against-gillibrand-amendment_741056.html)).

### **C. Appearance on NBC's "Meet The Press", August 11, 2013**

1. The status quo is not acceptable. *Meet The Press*, NBC Television Broadcast (Aug. 11, 2009) (video available at <http://www.nbcnews.com/id/3032608/#52727408>).
2. The reforms we're working on...will prioritize protecting the victim. And they're going to lead to more prosecutions. The alternative that's been proposed would have less prosecutions, based on what we know about the current system. *Meet The Press*, NBC Television Broadcast (Aug. 11, 2009) (video available at <http://www.nbcnews.com/id/3032608/#52727408>).
3. The right answer is making sure these cases do go forward. And here's the problem you have. If you have outside lawyers that are making this decision, sometimes a half a continent away from the unit, if they say no, it's over. And we know for a fact, David, over the last two years, almost 100 cases the lawyer said no. *Meet The Press*, NBC Television Broadcast (Aug. 11, 2009) (video available at <http://www.nbcnews.com/id/3032608/#52727408>).
4. We know that commanders are making these cases for forward, close to 100 times just in the last two years. Under the alternative, that's almost 100 victims that would not have had their day in court. And the question is, about retaliation: Where are you going to be more protected? Are you going to be more protected in a unit where lawyers, a long way away that nobody knows, have said yes or no? Or are you going to be more protected when the commander has signed off? *Meet The Press*, NBC Television Broadcast (Aug. 11, 2009) (video available at <http://www.nbcnews.com/id/3032608/#52727408>).
5. But at the end, the commander needs to sign off because if the commander doesn't have any role, we're letting them off the hook. And we cannot let these commanders off the hook. *Meet The Press*, NBC Television Broadcast (Aug. 11, 2009) (video available at <http://www.nbcnews.com/id/3032608/#52727408>).
6. But if we look at our allies who changed their systems to, frankly, not protect victims, but because they were forced to, to protect the perpetrators, the accused. Reporting has not gone up, David, in any of those countries. In fact, reporting has gone up

much more in the United States than it has in any of the militaries that have taken it out of the chain. *Meet The Press*, NBC Television Broadcast (Aug. 11, 2009) (video available at <http://www.nbcnews.com/id/3032608/#52727408>).

7. Retaliation is not gonna magically go away just because a lawyer a long way away has made a decision, as opposed to the commander. And we know commanders are making the decision to go forward more often than the lawyers. *Meet The Press*, NBC Television Broadcast (Aug. 11, 2009) (video available at <http://www.nbcnews.com/id/3032608/#52727408>).
8. We're going to hold the commanders accountable. We're going to make sure that these victims have their own lawyers, their own sense of protection, and that we absolutely go after retaliation with everything we've got. *Meet The Press*, NBC Television Broadcast (Aug. 11, 2009) (video available at <http://www.nbcnews.com/id/3032608/#52727408>).

**D. Claire McCaskill and Loretta Sanchez, *Commanders Must Fight Sexual Assault in the Military*, USA TODAY, Aug. 29, 2013**

1. We view this as a risky approach for victims — one that would increase the risk of retaliation, weaken our ability to hold commanders accountable, and lead to fewer prosecutions. Claire McCaskill and Loretta Sanchez, *Commanders Must Fight Sexual Assault in the Military*, USA TODAY, Aug. 29, 2013.
2. But we strongly support retaining a commander's ability to initiate courts martial — a tool we believe is central to a commander's capacity to protect victims and hold perpetrators to account. Outside lawyers will never carry the broad authority and legitimacy of a military commander within a unit, or the close grasp of the culture and discipline. Claire McCaskill and Loretta Sanchez, *Commanders Must Fight Sexual Assault in the Military*, USA TODAY, Aug. 29, 2013.
3. We also know that it's impossible to hold someone accountable for fixing a problem when you strip them of their responsibilities for fixing that problem. Congress's ability to hold Pentagon leadership accountable for stamping out sexual assaults will only be slowed if commanders are no longer responsible for doing so. Claire McCaskill and Loretta Sanchez, *Commanders Must Fight Sexual Assault in the Military*, USA TODAY, Aug. 29, 2013.
4. Most importantly, we've dug into the hard data surrounding these crimes. Supporters of the proposal to strip commanders of their responsibilities promise that their approach will lead to an increase in reporting and prosecutions. But in just the past two years, we found 93 cases of rape and sexual assault that prosecutors declined to prosecute, which were then referred to court martial by commanders. That's 93 victims who had their day in court because commanders, not prosecutors, had the ability to refer cases for court martial. Claire McCaskill and Loretta Sanchez, *Commanders Must Fight Sexual Assault in the Military*, USA TODAY, Aug. 29, 2013.
5. Additionally, supporters of stripping commanders of their responsibility in these cases fail to note that while some of America's allies have done so, most countries who took this course did so to better protect the rights of defendants, not victims —



and none saw an increase in reporting. Claire McCaskill and Loretta Sanchez, *Commanders Must Fight Sexual Assault in the Military*, USA TODAY, Aug. 29, 2013.

#### **IV. Independent Group Support for Proposed Legislation ARM13982**

##### **A. Elaine Donnelly, President, Center for Military Readiness, Statement to Committee on Armed Services House of Representatives, January 23, 2013**

1. Programs already in progress to improve the expertise of military JAGs with the responsibility to prosecute sexual harassment/assault claims are steps in the right direction. Proposals to take away chain of command authority over sexual assaults, however, would not be helpful. *Transcript of Hearing, H.A.S.C. A Review of Sexual Misconduct by Basic Training Instructors at Lackland Air Force Base at 185 (Jan. 23, 2013).*

##### **B. Reserve Officer Association Letter to Senator Levin, September 10, 2013**

1. In August, ROA's National Convention held its annual meeting. The delegates passed national resolution number 13-08, entitled "End Tolerance of Overt Sexual Behavior in the Military" (attached). Sexual assault and overt sexual aggressiveness in the Armed Forces is detrimental to good order and morale in our uniformed services.

In writing this resolution, ROA delegates to the convention included a preamble clause that the review authority of commanders in cases of sexual assault should be protected.

ROA does not support legislation to remove commanders from decision making in the handling of sexual assault cases and place that authority in the hands of trained military prosecutors and judges outside the designs of the Uniformed Code of Military Justice (UCMJ). There has to be a more effective way to keep review of these cases within the military chain of command.

Hasty actions to reform the UCMJ may lead to unexpected consequences and undermine trust in the chain of command. ROA wishes to express support for your proposal.

*Letter from MajGen(Ret) Andrew B. Davis, Nat'l Executive Dir., Reserve Officer Association (Sept. 10, 2013).*